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HAROLD B. WILLEY, Cl

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 669

THE MONARCH MACHINE TOOL COMPANY, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Monarch Machine Tool Company prays that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled case on February 8, 1954.

OPINIONS BELOW

The decision and order of the National Labor Relations Board (R. I, 40a)[1] is reported at 102 NLRB 134. The

[1] The record is composed of two volumes. References to the record in this petition will indicate the volume first followed by the page number.

opinion of the Court of Appeals for the Sixth Circuit (R. II, 36a) is reported at .

JURISDICTION

The judgment of the Court of Appeals was entered on February 8, 1954. A thirty-day stay of mandate pending application to this Court for Writ of Certiorari was granted by the Court of Appeals on March 5, 1954. The Jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED

(1) With respect to sections 1 (a) and 2 (a) of the Order of the National Labor Relations Board relating to the use of the parking lot of the employer, who is the petitioner herein:

(a) Whether the purposes of the National Labor Relations Act, as amended, will or can be effectuated by enforcement of the order of the National Labor Relations Board directing petitioner to cease giving effect to and to rescind, petitioner's rule—insofar as it applies to circulation and distribution of union literature on petitioner's parking lot during the employees' non-working time—against circulation and distribution of all literature on petitioner's premises, where, as here, at the time enforcement was decreed by the Court of Appeals the employees, acting by their bargaining agent, had agreed by contract not to circulate or distribute union literature on petitioner's premises.

(b) Whether the enforcement by petitioner of its aforesaid rule as against circulation of union petitions and the distribution of union literature on petitioner's parking lot has unreasonably restricted or unreasonably restricts petitioner's employees in the exercise of any rights guaranteed them by Section 7 of the National Labor Relations Act, as amended, where, as here,

1) employees for many years have fully exercised all rights so guaranteed to them while complying with the rule which is here below held invalid under the Act, and there was and could be no showing that such distributions or circulations on petitioner's property were essential to the exercise of any of those rights, and

2) the undisputed evidence showed that other and adequate means of communication between the petitioner and its employees and their representatives have been established in the exercise of such rights under the Act, and

3) where good and sufficient reasons were shown by the petitioner for the enforcement of the rule on its parking lot as well as on the rest of its property.

(2) With respect to sections 1 (b) and 2 (b) of the Order of the National Labor Relations Board relating to solicitation of union membership on petitioner's property during the employees' non-working time:

(a) Whether an Order of said Board is entitled to enforcement where, as here, there is no finding of the existence of the rule against which the Order is directed, and where in fact and as shown by the undisputed testimony in the record no such rule did or does exist.

(b) Whether petitioner's prohibition of employee solicitation on petitioner's property for any purpose during working hours, if applied without discrimination to all solicitations (including those for union membership), during the paid-time of unspecified duration allowed by the petitioner, when its plant is operating on a twenty-four-hour per day basis, to each employee solely for the purpose of eating his lunch wherever he chooses on petitioner's property, constitutes a violation of Section 8 (a) (1) of the Act where the reason for the rule is maintenance of maximum production, and where there is no evidence that solicitation was actually impeded thereby or that the prohibition had actually been so applied.

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended, are:

"RIGHTS OF EMPLOYEES

"SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3)."

"UNFAIR LABOR PRACTICES

"SEC. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;"

"PREVENTION OF UNFAIR LABOR PRACTICES

"SEC. 10. * * * (e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause

notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari of certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347)."

STATEMENT

It may be noted at the outset that this case does not involve any charge of discrimination against union activities under Section 8 (a) (3) of the Act.

Petitioner is engaged in interstate commerce in the manufacture and sale of metal turning lathes in Sidney, Ohio, a small town of approximately 12,000 inhabitants. (R. I, 18a)

The property of petitioner is bisected by a railroad, east of which is the plant proper and west of which is the parking lot here involved, and there is an overpass pedestrian bridge connecting the two. (R. I, 19a) The parking lot is completely fenced along the property boundary line, and there are gates in the fence for ingress and egress at the north and south ends of the lot. (R. I, 19a) The property adjacent to the parking lot at the north and south ends of the lot, immediately outside of each gate, is public property in the form of sidewalks and city streets. (R. I, 19a, 60a) Employee access to the petitioner's plant from such parking lot is either via the bridge or via the public ways around to the other entrances to the plant proper. Slightly less than 75% of the employees use the parking lot. (R. I, 20a)

Since 1938 petitioner has had in effect plant rules which prohibit the distribution or circulation of literature, petitions, or written or printed matter of any description on any of the petitioner's property. (R. I, 53a-56a) They were adopted long before petitioner's employees organized to bargain collectively. (R. I, 20a) The reasons for their adoption were to preserve discipline and order and to maintain good housekeeping. (R. II, 17a-19a)

Although the charging union, The United Electrical, Radio, and Machine Workers of America, Independent, negotiated five separate contracts with petitioner during the period of about eight years that it acted as the employees' bargaining agent, (R. I, 21a) it never during such negotiations objected to the plant rules prohibiting circula-

tion or distribution of all literature on Company property even though it was fully aware of their existence. (R. II, 15a-16a) In those negotiations the union requested and received contractual provisions to provide and guarantee to the employees means of communication between themselves and their union and the petitioner, including five bulletin boards in the plant for their exclusive use, supplied by the petitioner, (R. II, 15a-16a) and an elaborate system for representation of employees by union stewards and committeemen, paid by the petitioner, in the presentation of grievances and other matters to petitioner. (General Counsel's Exhibit #3, R. I, 59a-60a, 194a-195a) At the hearing petitioner made an offer of proof, which was rejected by the Trial Examiner, that during such eight year period approximately 500 grievance meetings had been held between representatives of the petitioner and the shop committee, representing the employees. (R. II, 16a, 17a) These were in addition to the daily contact between employees, stewards, and the petitioner's supervisory employees. In addition, the contracts in effect since 1950 provide for a union shop. (General Counsel's Exhibit #3, R. I, 59a, 60a, 183a) No claim was ever made until about February of 1952 that employees or their representatives had an absolute right to do on petitioner's property those things which were prohibited by the rules.

In February, 1952, representatives of the then incumbent union stationed themselves on petitioner's property at the westerly end of the overpass bridge described above for the purpose of soliciting employee signatures to a petition directed to the Wage Stabilization Board and urging favorable action on a pending application. (R. I, 147a) They were advised by representatives of petitioner that such action was prohibited on petitioner's premises by the plant rules here in question, and while they persisted to some extent in making solicitations and distributions at that point within the petitioner's premises, they soon thereafter

ceased (R. I, 147a-149a) and filed with the Board the charge which initiated this case. (R. I, 4a) From late in March, 1952, until October 24, 1952, when the hearing before the Board's Trial Examiner was concluded, the incumbent union made 37 different distributions of handbills to petitioner's employees on public property just outside the gates to the petitioner's parking lot as employees were coming to or leaving work. (R. II, 7a) Other unions, seeking representation rights, made at least 29 distributions in like manner during the same period.. (Respondent's Exhibits 26-54) Such distributions were highly effective, as testified by the Board's own witnesses, (R. I, 156a; R. II, 5a) and as may be assumed from the fact that they were made on the average of more than two per week to the petitioner's then 1,650 employees.

Some of the leaflets which were distributed on petitioner's property, as General Counsel's Exhibits 12-E and 12-F, (R. I, 142a, 219a, 220a) were of the defamatory and incendiary nature which was condemned in *Maryland Dry Dock Company* v. *N.L.R.B.*, 183 Fed. 2d 538 (C.A. 6th, 1950). Some leaflets which were distributed at the gates outside of petitioner's property (Respondent's Exhibits 67, 68, 69; R. II, 7a, 24a-26a) were eligible for posting on the bulletin boards provided by the petitioner. See, for example, Exhibit 66, (R. II, 7a, 23a).

Even while the Board was processing this case, and for approximately six months prior to the hearing (R. I, 26a), other unions were seeking representation rights from petitioner's employees, and on October 29, 1952, one week after the conclusion of the hearing, the International Union of Electrical, Radio, and Machine Workers of America, CIO, filed a petition with the Board for an election—NLRB Case No. 8-RC-1839. (R. I, 28a) Three unions participated in such election and none violated the rules in question in their electioneering. (R. I, 26a, R. II, 4a, 5a) None but the charging then-incumbent union ever challenged such rules. The election resulted in the designation of a differ-

ent bargaining agent, namely the International Association of Machinists, AF of L. (R. II, 31a, 32a)

Notwithstanding the foregoing, and with full knowledge thereof, the Board made its finding herein that "the circulation of union petitions, literature and pamphlets 'cannot readily be conducted away from Respondent's premises, and that its rule (prohibiting their circulation), at least insofar as it affects Respondent's parking lots adjacent to its plant, constitutes an unreasonable impediment to the freedom of communication essential to the exercise of its employees' rights to self-organization in violation of Section 8 (a) (1) of the Act.'" (R. I, 27a) Thus, the Board concluded that the specific right of petitioner's employees which was improperly restricted by the plant rule in question was the right of self-organization—and this, despite the fact that the employees had exercised that right fully by organizing in 1945 and designating the charging union as their bargaining agent. Accordingly, the Board entered its cease and desist order, and—upon petitioner's failure to comply with the order—petitioned the Court of Appeals for its enforcement.

After its certification the new bargaining agent negotiated a contract with petitioner in which the union and the employees specifically agreed not to distribute literature or circulate petitions on petitioner's premises. (R. II, 32a) Petitioner thereupon filed in the Court of Appeals a motion to dismiss the Board's petition for enforcement of those parts of its order relating to the use of petitioner's parking lot. (R. II, 28a-31a) Ruling on such motion was withheld until hearing on merits. (R. II, 35a)

The Court of Appeals subsequently granted the Board's petition for enforcement in its entirety, being of the opinion that this Court's decision in *National Labor Relations Board* v. *LeTourneau Company of Georgia* and *Republic Aviation Corporation* v. *National Labor Relations Board*, 324 U.S. 793 (1945) required the result reached. (R. II, 41a)

As to the question of solicitation of union membership on petitioner's property, petitioner has no rule prohibiting such activities during non-working time. (R. I, 28a) Petitioner does, however, prohibit all types of solicitation during working hours. The question arises here because of petitioner's operation of its facilities, at the time of the hearing and for some time prior thereto, on a three eight-hour shift basis in order to obtain maximum production. When its facilities are so operated, but not otherwise, each employee is allowed to eat at his post or in petitioner's cafeteria, using only such time as necessary for that purpose and without pay deduction.

The Board and Court found and ruled, in effect, that an employer cannot allow an employee to eat with pay during his normal work-time without also permitting solicitation for union membership at the same time. It is not clear, or explained, how one employee could solicit another under the circumstances above described without the former's thereby violating the admittedly lawful rule prohibiting all types of solicitation during working hours.

Petitioner's position was and is, simply, that it has the right to designate and limit the use which may be made of time paid for by it, where the time is normally work time and where the limitation is non-discriminatory within the meaning of the Act; particularly so where, as here, its employees are already exercising fully the rights guaranteed them by the Act, and the purpose in such limitation is to maintain the maximum production which can be obtained from twenty-four hour daily use of its facilities. This position in no way conflicts with this court's decision in *Republic Aviation Corporation* v. *National Labor Relations Board, supra,* for in the *Republic* case the solicitations occurred during non-working time and the employees were in the very act of exercising their self-organizational rights, whereas in this case the rule prohibited solicitation during normal working time and the employees had not only fully exercised their self-organizational rights but

had also secured a union shop clause in their existing collective bargaining agreement.

In any event, no actual case of solicitation or prohibition thereof occurred during this informal paid lunch period. The Board's question, (R. I, 66a) as to the application of the rule prohibiting solicitation during working time to this paid lunch time was hypothetical and was answered hypothetically. Furthermore, no showing was made that the application of such rule to the paid lunch time would impede employees in the exercise of their rights under the Act.

REASONS FOR GRANTING THE WRIT

I—The Questions Presented Are of Substantial Importance in the Administration of the National Labor Relations Act, as Amended, and Should be Reviewed by This Court.

It has been pointed out in the factual Statement of the case that the union which is now the certified bargaining agent of petitioner's employees has agreed by contract to refrain from all distributions of union literature on petitioner's property during the term of the contract.

The N.L.R.B. appears to admit that this contractual undertaking is not affected by the outstanding judgment of the Court of Appeals prohibiting enforcement of petitioner's plant rule against distribution of union literature on the petitioner's parking lot, as indicated by the following statement which appears in the Board's opposition to respondent's motion to dismiss: (R. II, 34a)

> "... The provision described in respondent's motion prohibits the distribution of literature and circulation of petitions 'by employees or by the union (International Association of Machinists, A.F.L.) or its representatives', whereas *the Board's order enjoins this prohibition as applied to rival unions and non-employees as well.*" (emphasis supplied)

Thus, enforcement of the Board's order may produce a situation in which all unions except the contracting (incumbent) bargaining agent are free to distribute literature

in the petitioner's parking lot. How can the resulting confusion effectuate the purposes of the Act in this case? Almost certainly one result must be the promotion of industrial unrest and instability in the bargaining relationship between the petitioner, its employees, and the incumbent union—a result precisely contrary to the declared purposes of the National Labor Relations Act, as amended. The Court of Appeals in considering this issue appears only to say that, since the Board's order preceded the contractual provision in time, the order is entitled to enforcement (R. II, 44a).

It may be asked, whose rights are before the Court?

(a) In its complaint (R. I, 8a) the Board spoke of the rights of employees. They have expressed their wish by contractual provision, and no complaint is made that same is contrary to law for any reason.

(b) In its brief to the Court of Appeals, (9, 15) the Board spoke of the rights of an incumbent union. The now-incumbent union has spoken by contractual provision. (R. II, 32a)

(c) In its opposition to motion to dismiss, the Board spoke of rival unions and non-employees. (R. II, 34a) It is submitted that they have no rights under the Act, or that if they have they are not before the Board or the Court in this proceeding.

So far as our research reveals, enforcement of a Board order has never been decreed in comparable circumstances. The case thus presents a novel and important issue in the administration of the National Labor Relations Act, as amended, which merits review by this Court.

In the alternative it is submitted that the judgment of the Court of Appeals should be vacated and the case remanded to the Labor Board so that such Agency—which has the primary responsibility for administration of the Act—can determine for itself whether or not enforcement

of the Board's order in the circumstances of this case accords with the over-all policy of the Act.

Such a procedure is authorized by Section 10 (e) of the National Labor Relations Act, as amended. In circumstances closely analogous to those of the present case, this Court has said that "a remand to the Board is ordinarily in order". *National Labor Relations Board* v. *Jones and Laughlin Steel Corp.*, 331 U.S. 416, 428 (1947).

An important question is also raised by the order of the Board relating to petitioner's solicitation rule. Should the Board be permitted to issue orders directed against non-existent rules?

II—The Decision of the National Labor Relations Board and the Opinion of the United States Court of Appeals Enforcing the Board's Order Constitute an Improper Application and Extension of the Rule Announced by This Court in the LeTourneau and Republic Aviation Cases.

Two primary factors distinguish the parking lot phase of the instant case from *LeTourneau* and render the rule there laid down inoperable here:

(1) In *LeTourneau* it was shown that effective distribution of union literature off the Company's premises was practically impossible. Here, the testimony of the Board's own witness showed that distribution outside the petitioner's plant gates was 90% effective. (R. I, 156a)

(2) In *LeTourneau*, the employees in question were not organized. This fact, together with the practical impossibility of distributing literature away from the Company's premises, required the conclusion that, if distribution of union literature was not permitted on the Company's premises, the employees would be wholly denied the opportunity to exercise the right of self-organization guaranteed them by Section 7 of the Act. Here, the charging union had, and the now-incumbent union has, a collective bargaining contract with the petitioner

which provided for a union shop, union bulletin boards in the plant, and an elaborate representation system and grievance procedure for communication between employee and union and between them and the petitioner. In combination these contractual provisions assured the union and the employees of adequate means of communication. In brief, *LeTourneau* was a case where employees were trying to exercise their right of self-organization, whereas the employees of this petitioner *have long exercised* not only their right of self-organization but also all of their other rights under the Act.

In the *LeTourneau* case this Court recognized that cases of this type present a problem of "adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishment" (324 U.S. at PP. 797, 798). The court pointed out that:

> "... these rights are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee. Opportunity to organize and proper discipline are both essential elements in a balanced society."

Thus, the Court recognized the right of an employer to control the uses which may be made of his own property, so long as the employer's exercise of his right of control does not interfere with the concurrent right of his employees to self-organization. Obviously, we submit, the application of such a rule requires that, before the right of the employer to control his property can be invaded or restricted, there must be a finding that the invasion or restriction to be imposed is necessary, and not merely convenient, to preserve the right of his employees to organize. Otherwise, the employer's right is meaningless.

In the instant case both the Board and the Court of Appeals have ordered the petitioner to relinquish partial

control of its property without any showing that such relinquishment is necessary in order to preserve the employees' right to self-organization

The Court below and the Board have ignored the fact that the rule of *LeTourneau* is but one of rebuttable presumption, or have made the presumption so strong that it cannot be overcome as a practical or legal matter if it is inadequate to show, as petitioner has shown, that employees have readily, continuously and effectively exercised all of those rights which it was found below could not be so exercised under the petitioner's rules.

For similar reasons we believe that the rule of the *Republic* case has no application where an employer's sole purpose in prohibiting employee solicitation of any kind during an informal, paid lunch period, during normal working hours, was to reduce to a minimum the paid time during which the employee would not be engaged in productive work.

It is submitted that the Board's effort to extend the rule of *National Labor Relations Board* v. *LeTourneau Company of Georgia* and *Republic Aviation Corporation* v. *National Labor Relations Board* to the facts of this case presents a question of substantial importance to the administration of the Act which should be reviewed by this Court. Those were pre-organization cases. This is a post-organization case. It has never been decided, to our knowledge, nor does it appear to us that it is or should be the rule, that if employees must be permitted to invade an employer's property rights in order to exercise their right to self-organization under the Act, such invasion is a continuing right even though the necessity which gave rise to it no longer exists. Rights under the Act are not necessarily the same at all stages of the self-organization collective-bargaining processes, and particularly should this be true of the right to invade or to continue invading the rights of others where at most, as here, the showing made is not one of necessity but only one of preference or convenience.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*):

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 669

THE MONARCH MACHINE TOOL COMPANY,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. II. 36a)[1] is reported at 210 F. 2d 183. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. I. 40a) are reported at 102 NLRB 1242.

JURISDICTION

The decree of the court below was entered on February 8, 1954 (R. II. 36a). The petition for a

[1] The record consists of two volumes, identified as Volumes I and II; references thereto are designated, respectively, as "R. I." and "R. II."

writ of certiorari was filed on April 2, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1) and Section 10 (e) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

1. Whether the Board's findings, approved by the court below, that petitioner's rules prohibiting the distribution of union literature in its parking lot and the solicitation by employees of union membership in the plant cafeteria during nonworking time constituted an unreasonable impediment to the employees' exercise of their rights under the Act, and were therefore violative of Section 8 (a) (1) of the Act, are supported by substantial evidence on the record as a whole.

2. Whether the Board's order requiring petitioner to rescind and cease enforcing its rule against the distribution of literature on company property is entitled to judicial enforcement despite the circumstance that petitioner, subsequent to the issuance of the Board's order, has entered into an agreement with the employees' new collective bargaining representative consenting not to perform such acts.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*), in addition to those set forth in the petition (pp. 4–5), are as follows:

PREVENTION OF UNFAIR LABOR PRACTICES

Section 10. * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

STATEMENT

Following the usual proceedings under the Act upon charges filed by the Union,[2] the court below approved the Board's findings that petitioner had violated Section 8 (a) (1) of the Act by maintaining and enforcing a rule prohibiting the distribution of union literature to its employees in its plant parking lot during their non-working hours, and by maintaining a rule prohibiting the solicitation of union membership in the plant cafeteria during non-working hours.

A. THE FACTS AS FOUND BY THE BOARD

1. *Enforcement of the rule against distribution of literature on company property.*—In 1938,

[2] Local 18, International Union of Mine, Mill and Smelter Workers.

petitioner promulgated rules which prohibited the circulation of petitions or the distribution of literature on its property (R. I. 20a; 53a–54a). These rules were incorporated in subsequent manuals published and circulated by the petitioner in 1941, 1942, and 1946 (R. I. 20a; 54a–56a). On March 26, 1952, petitioner posted a notice on its bulletin board reiterating its no-distribution rule (R. I. 23a; 67a–68a, 69a–70a).

Petitioner's plant is located in Sidney, Ohio, a town having a population of approximately 12,000 inhabitants (R. I. 18a; 82a, 84a). Petitioner, operating on three 8-hour shifts, employs 1,600 to 1,650 workers (R. I. 18a; 73a, 130a). Employees, except those living within walking distance, reach and leave the plant by private automobiles for which petitioner has provided private parking lot facilities (R. I. 18a; 85a, 125a–130a). Approximately 72 percent of the employees drive to work and park in the present parking lot (R. I. 20a; 125a–132a), which is entirely within company property lines and is completely fenced, except for gate entrances (R. I. 19a; 60a). The only ingress to the plant from the parking lot is by means of a pedestrian bridge leading over some railroad tracks to the west entrance to the plant (R. I. 19a; 119a–120a, 179a). Except in case of emergency, automobile entrance to, and exit from, the parking lot is possible only through two gate entrances known as the South gate and the North gate (R. I. 19a; 114a, 115a).

Traffic to these gates is brought from two main arteries (R. I. 19a; 108a, 115a–116a, 132a).

Distribution of literature outside the gates of the parking lot is both ineffective and hazardous (R. I. 27a; 149a–152a, 132a–137a, 153a–155a, 158a–159a). At the South gate, traffic comes down a straightway from a state highway approximately 450 feet distant from that gate (R. I. 27a; 117a, 136a). There is no stop light, stop sign, or caution of any type there (R. I. 132a) and traffic moves "at a fairly good clip" (R. I. 27a; 136a, 151a). When weather conditions make traction difficult, automobiles skid past or dangerously close to those who seek to stop them in order to distribute union literature to the occupants (R. I. 27a; 137a, 151a). When darkness sets in, in order to get a car to stop, the distributor has to "get out where they can see you" (R. I. 27a; 152a). That is, the distributor must stand in the middle of the street and make some kind of motion so that the driver will see him and stop, if he so desires (R. I. 152a). If he decides not to stop, the distributor must "get out of the road afore they will run over you" (R. I. 152a). Finally, at any time, when a car is stopped to receive union literature, traffic is held up causing congestion and much resentment due to the resulting blocked traffic (R. I. 27a; 150a–151a). Also, because of this congestion and resentment, it is impossible to get a petition signed or discuss the material circulated (R. I. 153a, 151a).

The same impediments to effective distribution as enumerated above are present at the North gate (R. I. 27a; 134a–136a, 149a–151a). In addition to those, since cars enter from both the east and the west, when union workers stop cars on the cross-walk just outside that gate, traffic is jammed in both directions (R. I. 27a; 133a, 150a). The resulting congestion and irritation causes the workers to drive hastily through the gate without stopping and with danger to the distributors (R. I. 27a; 134a, 135a, 150a). When the weather is inclement, only about 50 percent of the cars stop (R. I. 27a; 156a).

Thus, distribution on company property, as Union representatives testified, is the only way to "adequately reach and handle and carry on [the Union's] legitimate . . . business" (R. I. 159a, 165a).

For years distributions of union material has been made on company property in the presence of guards and foremen who not only refrained from objecting, but on a number of occasions, during bad weather, invited the distributors to carry on their work inside the entrances (R. I. 22a; 88a, 89a, 112a). After the present parking lot was opened and until about February 22, 1952, principal distribution of union literature and circulars was made in, or closely adjacent to, the vestibule entrance to the plant located at the east end of the bridge over the railroad tracks where it was likewise observed by guards and

supervisors without objection (R. I. 22a; 91a, 138a, 173a).

However, sometime between February 15 and February 22, 1952, when certain union representatives were distributing a leaflet at the east end of the bridge, they were told by guards that they would have to go outside as distribution on company property was against the rules (R. I. 22a; 139a–140a, 145a, 219a). The Union decided it had the right to distribute leaflets on company property, and continued to do so, but on the parking lot side of the bridge (R. I. 22a; 140a).

There, on February 22, 1952, the union supporters solicited the signatures of petitioner's employees to a petition adressed to the Wage Stabilization Board asking that body to approve and expedite action on a proposed wage increase then pending before that Board (R. I. 22a; 223a, 90a–92a, 146a). They were again told by plant guards that they would have to get off company property as their activity was against company rules;[3] but they refused and continued to solicit signatures to the petition (R. I. 147a–148a).

The distribution of union literature on the parking lot continued until about March 18 or 19 when petitioner discharged an employee for an undisclosed cause (R. I. 22a; 148a), and a work stoppage occurred (R. I. 23a; 95a, 148a). On the

[3] Petitioner's vice president testified that the prohibition against distributing leaflets is a "blanket" prohibition, and includes petitions (R. I. 71a).

day the employees returned to work, petitioner posted a notice on its bulletin board which reiterated its no-distribution rule (R. I. 23a; 206a, 200a).[4] At that time the Union promised not to circulate literature on company property until the issue of the right to do so was decided by the Board (R. I. 23a; 101a, 149a).

2. *Applicability of petitioner's no-solicitation rule to the company cafeteria.*—During the three 8-hour shifts, no specific lunch periods are prescribed for the employees, but each department has a designated time for use of the cafeteria (R. I. 28a; 64a, 123a). Employees may also eat at their posts (R. I. 64a), but wherever they eat they are paid for the full 8-hour period including the time allowed for lunch (R. I. 28a; 66a).

At the hearing, a vice president of petitioner testified that the no-solicitation rule was "all-inclusive" (R. I. 63a) and it applied to the employees' lunch period "because he has no lunch hour" (R. I. 67a).

B. THE BOARD'S CONCLUSIONS AND ORDER

Upon the basis of the facts, the Board concluded that the distribution of union petitions and literature could not readily be conducted away from petitioner's premises, and that its no-distribution rule, insofar as it affects the distri-

[4] This notice read: "There shall be no distribution or circulation of literature, petitions, or written or printed matter of any description on any of the Company's premises."

bution of union literature in petitioner's parking lot adjacent to its plant, constitutes an unreasonable impediment to the freedom of communication essential to the exercise of the employees' rights to self-organization, in violation of Section 8 (a) (1) of the Act (R. I. 27a, 41a).

The Board also concluded that by its prohibition against the solicitation of union membership in the cafeteria, during non-working hours, petitioner further violated Section 8 (a) (1) of the Act (R. I. 29a, 41a).

The Board's order requires petitioner to rescind and cease enforcing its rule prohibiting the circulation and distribution of union petitions and literature in the parking lot and the solicitation of union membership on company property during the employees' non-working time, and to post the usual notices (R. I. 41a–43a).

C. THE DECISION OF THE COURT BELOW

In the court below petitioner moved to dismiss the Board's petition for enforcement of its order insofar as it prayed for enforcement of the provisions of the order requiring petitioner to rescind and cease enforcing its rule prohibiting the circulation of union petitions and the distribution of union literature in its parking lot during the employees' non-working time. Petitioner stated that subsequent to the entry of the Board's order it had executed a contract with the certified bargaining representative of the employees which

provided in part that "There shall be no distribution or posting by the employees or the Union * * * of * * * any kind of literature upon any of the Company's property, other than on the bulletin boards, herein provided; and there shall not be any circulation of petitions on any of the Company's property" (R. II. 28a–31a). The court below denied the motion (R. II. 43a–44a). The court also held that the Board's findings and conclusions were supported by substantial evidence on the record as a whole and upon the authority of this Court's decision in *National Labor Relations Board* v. *LeTourneau Co.* and *Republic Aviation Corporation* v. *National Labor Relations Board,* 324 U. S. 793, enforced the Board's order in full (R. II. 36a–44a).

ARGUMENT

1. The Board's finding, approved by the court below, that petitioner's prohibition against the circulation of union literature in the parking lot constituted an unreasonable impediment to the employees' freedom of communication essential to the exercise of their rights under the Act in violation of Section 8 (a) (1) of the Act is squarely supported by the controlling decision of this Court in *National Labor Relations Board* v. *LeTourneau Co.,* 324 U. S. 793. Petitioner's efforts to distinguish that case present no question for review by this Court. Thus, petitioner's assertion (Pet. 13) that adequate means of com-

munication exist outside company property presents a factual issue which the Board and the court below have resolved adversely to petitioner on the basis of the record as a whole. The resolution of that issue by the court below should be left undisturbed on the basis of this Court's "'usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations.'" *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U. S. 498, 503.

Also insubstantial as a basis for certiorari is petitioner's assertion (Pet. 13–15) that the *LeTourneau* rule is inapplicable here, first, because adequate means of communication existed between the employees and their bargaining representative by virtue of the current collective bargaining contract making bulletin boards in the plant available to that union for posting notices, and second, because the employees here, unlike the employees in the *LeTourneau* case, had already achieved a high degree of self-organization for collective bargaining purposes. These contentions overlook two important considerations. The employees' right "fully and freely to discuss and be informed" concerning the exercise of their rights under the Act (*Thomas* v. *Collins*, 323 U. S. 516, 533–534) is not limited to communication between them and their bargaining representative but also extends to communication between them

and other labor organizations. *LeTourneau, supra; National Labor Relations Board* v. *Lake Superior Lumber Corp.,* 167 F. 2d 147, 151–152 (C. A. 6); *National Labor Relations Board* v. *Carolina Mills, Inc.,* 190 F. 2d 675 (C. A. 4); *National Labor Relations Board* v. *Caldwell Furniture Co.,* 199 F. 2d 267 (C. A. 4), certiorari denied, 345 U. S. 907; *National Labor Relations Board* v. *American Furnace Co.,* 158 F. 2d 376, 380 (C. A. 7). Further, the employees' right to be so informed manifestly is a continuing one and there is no basis in reason or precedent for limiting the application of the *LeTourneau* rule to a situation where the employees have not yet achieved self-organization for collective bargaining purposes.

Petitioner's further contention (Pet. 15) that its ban against solicitation of union membership in the plant cafeteria during the employees' lunch time is valid because it is a paid lunch period likewise disregards the decisive factor that the propriety of a no-solicitation rule depends upon whether it applies to "working" as opposed to "non-working" time and not upon the "immaterial distinction between paid and unpaid time." *Olin Industries* v. *National Labor Relations Board,* 191 F. 2d 613, 617 (C. A. 5), certiorari denied, 343 U. S. 919; *Republic Aviation Corp.* v. *National Labor Relations Board,* 324 U. S. 793, 803–804; *National Labor Relations Board* v. *Clark Bros. Co., Inc.,* 163 F. 2d 373, 375 (C. A.

2); *National Labor Relations Board* v. *Illinois Tool Works,* 153 F. 2d 811, 815 (C. A. 7).

2. Petitioner asserts (Pet. 11–13) that part of the order became moot when, subsequent to the entry of the Board's order, it entered into a collective bargaining agreement with the employees' bargaining representative which prohibited the union from circulating or posting notices or other literature anywhere on the Company's property except upon certain prescribed bulletin boards in the plant. But, as this Court has repeatedly held, supervening circumstances which may indicate that the need for a Board remedial order is less than when issued are no defense to judicial enforcement of the order. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines,* 303 U. S. 261, 271; *National Labor Relations Board* v. *Pool Mfg. Co.,* 339 U. S. 577, 581; *National Labor Relations Board* v. *Crompton-Highland Mills,* 337 U. S. 217, 225, n. 7. Even if the contract, during its operative period, made the order in part unnecessary, the existence of the order is an appropriate safeguard against petitioner's revitalization of the rule upon the expiration of the contract. Moreover, the contract purports to circumscribe the means of communication among the employees and between them and their bargaining representative. It does not purport to restrict the "correlative right" of other labor organizations "to discuss with and inform the employees" concerning organizational matters

(*Thomas* v. *Collins,* 323 U. S. 516, 533–534) at places on petitioner's premises, like the parking lot, which are appropriate for that purpose. To that extent, at least, the order continues to be directed "to the situation which calls for redress" (*National Labor Relations Board* v. *Mackay Radio & Telegraph Co.,* 304 U. S. 333, 348).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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